IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 26911-6-III**
	)	**(consolidated with**
Respondent,	)	**No. 26917-5-III)**
	)	
v.	)	
	)	
WILLIAM B. BARKLEY III,	)	
	)	**Division Three**
Appellant.	)	
----------	)	
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	
	)	
NICOLAS M. SALGADO,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Schultheis, C.J. — Codefendants, William Barkley III and Nicolas Salgado, were convicted of first degree robbery. On appeal, they contend the trial court erred by failing to suppress the showup identification and that the evidence is insufficient to support their respective convictions.[1] Mr. Barkley also contends that the trial court should have

admitted certain statements under ER 106. We reject the contentions and affirm.

FACTS

On July 29, 2007, at 10:18 p.m., Officer Shaidon Storch received a report of two men assaulting a man inside a car parked near the House of Charity, a homeless shelter in Spokane, Washington. Officer Storch arrived at the scene within five minutes and saw Mr. Barkley and Mr. Salgado standing near a car that matched the 911 caller's description. Officer Storch asked Mr. Barkley what he was doing with the car. He responded that he had borrowed it from the driver in exchange for some "dope." Report of Proceedings (RP) at 9. The officer noticed that the front passenger window was broken and asked Mr. Barkley if he knew what happened. Mr. Barkley stated that he did not know. He also stated that he and Mr. Salgado had been pushing the car because they had been unable to start it.

Officer Storch next contacted Michael Graham in front of the House of Charity. Mr. Graham reported that he had been attacked in his car by a large black man and a large Hispanic man. He claimed that the Hispanic male approached his car and broke the window of the front passenger door. He also reported that the Hispanic male opened the door, grabbed him around the neck, and punched him with a closed fist. Then the black

[1] Both cases involve substantially identical issues of law and we therefore consolidate them for purposes of this opinion. RAP 3.3(b).

male also began hitting him. Both searched his pockets and told him they were going to steal his car. One of them grabbed his keys and then let him go.

Officer Storch transported Mr. Graham for a showup identification where Mr. Barkley and Mr. Salgado were standing near Mr. Graham's car. Mr. Graham immediately identified the pair as his assailants and stated that he was 100 percent certain of his identification.

Officer Storch searched the interior of the car for a gold necklace Mr. Graham claimed was missing after the incident. He found a blue hat inside and asked Mr. Graham if it belonged to him. Mr. Barkley blurted out, "'That's my hat.'" RP at 12, 29, 41. Mr. Barkley and Mr. Salgado were subsequently arrested and charged by amended information with first degree robbery.

Before trial, Mr. Barkley and Mr. Salgado moved to suppress the showup identification as unduly suggestive and unreliable. To support their argument, they pointed out that Mr. Graham's descriptions of them were vague, and that he lacked an adequate opportunity to view his assailants during the attack.

The court allowed the State to introduce the showup identification. It agreed that the showup was suggestive, but found Mr. Graham's identification reliable because of the short time between the crime and the identification, and Mr. Graham's absolute certainty that Mr. Barkley and Mr. Salgado were his assailants.

Mr. Barkley also moved to suppress all of his statements to Officer Storch, arguing he should have been advised of his *Miranda*[2] rights before questioning. The court excluded all of Mr. Barkley's statements except for his statement about his hat, finding the latter statement had not been the result of police questioning.

After this ruling, Mr. Barkley changed his position and asked the court to admit all of his statements under ER 106. He argued that the hat statement standing alone would mislead the jury to believe he was admitting guilt and that his other statements were necessary to provide context for this remark. The State responded that these statements were not admissible because they constituted self-serving hearsay under ER 801(d)(2). The court denied Mr. Barkley's motion.

At trial, Mr. Graham testified that on the evening of July 29 he went to the House of Charity looking for a place to sleep. The facility was full so he decided to sleep in the front passenger seat of his car, which was parked near the shelter. About two hours later, he was awakened by the breaking of the front passenger window. A man punched him, grabbed him by the throat, and demanded money. Another man searched Mr. Graham's pockets and took his keys. He testified that these events occurred in less than a minute.

Mr. Graham could not recall whether he had been able to get a good look at his assailants during the attack. However, he stated that he had been able to look at them for

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

about five seconds as he escaped from the car, emphasizing that he "got a clear look" at them. RP at 279. He stated that after the attack his cell phone was missing from his car and that his face had cuts, his eyes were bruised, and four of his front teeth were knocked out.

John Staggs testified that he witnessed the incident while standing in front of the House of Charity. He knew Mr. Salgado from previous contacts at the shelter and recognized him as the person who broke the car window. He testified that he also witnessed the other person punching and choking Mr. Graham.

A jury convicted Mr. Barkley and Mr. Salgado as charged. They both appeal.

ANALYSIS

Mr. Barkley and Mr. Salgado both argue that the trial court erred in allowing the showup identification evidence. Specifically, they contend that the trial court erred in concluding that the identification was reliable despite the suggestiveness of the procedure. They point out that Mr. Graham's attention was compromised by the stress of the attack, he had very little opportunity to view his assailants because it was dark and the attack was brief, and his description of his assailants was vague and general. They contend that Mr. Graham's absolute certainty of his identification is explained by the suggestiveness of the procedure. Finally, they contend that without the identification evidence, insufficient evidence supports the convictions.

The parties do not contest the court's finding that the showup identification was suggestive. Therefore, we evaluate the court's conclusion that the identification was reliable despite the suggestiveness. We review the trial court's findings of fact on a motion to suppress to determine whether they are supported by substantial evidence, and if so, whether the findings support its conclusions of law. *State v. Ramires*, 109 Wn. App. 749, 37 P.3d 343 (2002).

The trial court considers the following factors in assessing reliability: (1) the witness's opportunity to view the perpetrator during the crime, (2) the witness's degree of attention, (3) the accuracy of prior descriptions, (4) the witness's certainty at the time of identification, and (5) the length of time between the crime and identification. *Id.* at 762 (quoting *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999)). The court evaluates the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. *State v. Shea*, 85 Wn. App. 56, 59, 930 P.2d 1232 (1997).

Under this analysis, Mr. Barkley and Mr. Salgado fail to demonstrate that under the totality of the circumstances, there was a substantial likelihood of misidentification. First, contrary to their assertion that Mr. Graham had little opportunity to see his assailants and that the stress of the attack compromised his attention, Mr. Graham testified that he "got a clear look" at them for about five seconds as he escaped from the

car after the attack. RP at 279. Furthermore, Mr. Graham immediately and unequivocally identified both Mr. Barkley and Mr. Salgado as his assailants, stating he was "100 percent positive" of his identification. RP at 11. Finally, the showup occurred within 14 minutes of the original call to police. We conclude that the trial court did not abuse its discretion in finding the showup identification reliable.

In view of this analysis, Mr. Salgado's and Mr. Barkley's claim that the evidence is insufficient fails. A person commits robbery if he or she unlawfully takes personal property from another against that person's will and uses force to retain possession of the property or to prevent or overcome resistance to the taking. RCW 9A.56.190. A person commits first degree robbery if, in the commission of a robbery, he or she inflicts bodily injury. RCW 9A.56.200(1)(a)(iii).

Neither Mr. Barkley nor Mr. Salgado dispute that Mr. Graham was robbed or that he suffered bodily injury as a result of the robbery. Their only contention is that Mr. Graham's identification of them was tainted by the suggestiveness of the procedure—an argument we have rejected. We conclude that ample evidence supports a finding that Mr. Barkley and Mr. Salgado were the assailants. To recap the facts: (1) Officer Storch arrived at Mr. Graham's car within five minutes of the 911 call, (2) upon arrival, he saw Mr. Salgado and Mr. Barkley next to Mr. Graham's car, (3) Mr. Graham unequivocally identified both men as his assailants shortly after the crime, and (4) an independent

witness saw Mr. Salgado break the window.

Next, Mr. Barkley argues that the trial judge committed reversible error by refusing to admit Mr. Barkley's statements to Officer Storch under ER 106, the rule of completeness. He asserts that these statements should have been admitted because they were necessary to explain his statement to Officer Storch that he owned the hat found in Mr. Graham's car.

We review a trial court's decision to admit evidence under an abuse of discretion standard. When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

The rule of completeness was defined in *State v. West*, 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967) as follows:

> Where one party has introduced part of a conversation[,] the opposing party is entitled to introduce the balance thereof in order to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved. This is true though the evidence might have been inadmissible in the first place.

ER 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, . . . which ought in fairness to be considered contemporaneously with it.

Washington case law interpreting ER 106 requires that the evidence the proponent seeks to admit must be relevant to the issues in the case. *State v. Larry*, 108 Wn. App. 894, 910, 34 P.3d 241 (2001). Once relevance has been established, the trial court should ask whether the offered evidence (1) explains the admitted evidence, (2) places it in context, (3) avoids misleading the trier of fact, and (4) insures a fair and impartial understanding of the evidence. *Id.* (citing four-part test set forth in *United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992)). Generally, a defendant's self-serving hearsay statement is not admissible unless it is "'part and parcel of the very statement a portion of which the Government was properly bringing before the jury.'" *Id.* at 909 (quoting *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1993)).

Here, upon questioning by Officer Storch, Mr. Barkley made three statements: (1) that he was borrowing the car in exchange for some dope, (2) that he did not break the car window, and (3) that he had been pushing the car because it would not start. Mr. Barkley's spontaneous statement regarding the hat provides no explanation of these previous statements as it was separated in time and context from them. The excluded statements were neither relevant nor necessary to explain his statement that the hat belonged to him. Accordingly, the trial judge did not abuse his discretion in disallowing the admission of Mr. Barkley's statements under ER 106.

Finding no error, we affirm.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, C.J.

WE CONCUR:

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Sweeney, J.

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Kulik, J.